

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)



Issue Date: 14 January 2004

CASE NO.: 2002-LHC-2722

OWCP NO.: 07-149635

IN THE MATTER OF:

KEVIN HILL,

Claimant

v.

GULF COAST FABRICATIONS,

Employer

and

**RELIANCE NATIONAL INDEMNITY
COMPANY, IN LIQUIDATION, BY AND
THROUGH, THE MISSISSIPPI
INSURANCE GUARANTY ASSOCIATION¹**

Carrier

APPEARANCES:

TOMMY DULIN, ESQ.

For The Claimant

DONALD P. MOORE, ESQ.

For The Employer/Carrier

**BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge**

¹ The caption appears as amended at the hearing. (Tr. 5).

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Kevin Hill (Claimant) against Gulf Coast Fabrications (Employer) and Reliance National Indemnity Company, In Liquidation, by and through, the Mississippi Insurance Guaranty Association (MIGA or Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on May 21, 2003, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant submitted 22 exhibits, Employer/Carrier proffered 25 exhibits which were admitted into evidence along with one Joint Exhibit.² Post-hearing briefs were received from the Claimant, Employer/Carrier and the Regional Solicitor on July 17, 2003. This decision is based upon a full consideration of the entire record.³

Based upon the stipulations of Counsel, the evidence introduced and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Claimant sustained an injury to his right knee on June 16, 1998. Employer/Carrier deny that any alleged injuries to Claimant's back, hip, ankle, or foot are related to his employment.

2. That Claimant's right knee injury occurred during the

² Claimant's Exhibit No. 22, the deposition of Dr. Kyle Dickson, was submitted after the hearing at which time it was received into evidence.

³ References to the transcript and exhibits are as follows: Tr.____; Claimant's Exhibits: CX-____; Employer/Carrier's Exhibits: EX-____; and Joint Exhibit: JX-____.

course and scope of his employment with Employer.

3. That jurisdiction of this claim is appropriate under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq.

4. That there existed an employee-employer relationship at the time of the right knee accident/injury.

5. That the employer was timely advised of the injury.

6. That a timely Notice of Controversion was filed.

7. That Claimant's average weekly wage at the time of his right knee injury was \$677.13.

8. That temporary total disability compensation was paid to Claimant from June 17, 1998 to July 31, 2001 in a total amount of \$58,942.59.

9. That MIGA has paid no medical benefits since the bankruptcy of Employer.

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether Claimant's back injury is related to his employment.

2. Whether Claimant's hip and ankle/foot injuries are related to his employment.

3. Whether Claimant had an intervening trauma to relieve Employer of liability.

4. The nature and extent of Claimant's disability.

5. Claimant's entitlement to and authorization for medical care and services pursuant to Section 7 of the Act.

6. Whether Employer is entitled to a credit for compensation and wages paid.

7. Causation of Claimant's back, hip and ankle/foot injuries.

8. Employer/Carrier's entitlement to Section 8(f) relief.
9. Attorney's fees, penalties and interest.

III. SUMMARY OF THE EVIDENCE

The Testimonial Evidence

Claimant

Claimant testified at the hearing and was also deposed by the parties on December 2, 2002. (EX-22).

Claimant is a 44 year old male with a twelfth grade education. He has worked as a first-class electrician since 1992. He is married with two children. (Tr. 29).

Claimant testified he has vocational training as an electrician,⁴ but does not have a license or certificate of completion.

Claimant had two back operations performed by Dr. Bazzone in 1985 and 1986 after he turned over on a tractor during work. He received a settlement of \$66,000.00. (Tr. 31). He has never had any other personal injury case. (Tr. 32).

Claimant was hired by Gulf Coast Fabrication in May 1995 and assigned an electrical job. (Tr. 32). He passed the pre-employment physical. Claimant testified his duties included working on welding machines, flux core boxes, "moving racks machines around," and any other electrical work. Claimant worked alongside the navigable waters of the United States on barges built by Gulf Coast Fabrication. (Tr. 33-34).

On June 16, 1998, Claimant injured his right knee and left elbow while hooking up a rack of welding machines in the dry dock. He tripped over a piece of steel and landed on another piece while running away from a bull line that had blown loose. He reported the accident and received medical services and did not work anymore on the day of the accident. (Tr. 34).

First-aid sent Claimant to Primary Care. (Tr. 34). Claimant then chose to see Dr. Flores a day or two after the

⁴ Claimant stated in his deposition he also has vocational training in welding. (EX-22, p. 5).

accident because he was still having trouble with his right knee. Dr. Flores had treated Claimant in 1985 when he injured his back. Dr. Flores unsuccessfully tried to drain a blood clot from Claimant's knee in his office. (Tr. 35).

Claimant returned to regular duty work on August 3, 1998. (Tr. 36). At the end of January 1999, he returned to Dr. Flores because he continued having problems with his right knee, including swelling and buckling. Claimant was pulled off work. (Tr. 37). On February 2, 1999, Dr. Flores surgically removed the bursa from Claimant's right knee and kept Claimant off work and referred him to physical therapy at Gulf Coast Rehabilitation. (Tr. 38).

In August 1999, Claimant tried to go back to work. Dr. Flores told him he would have to go through a work hardening program at Work Force Rehab before he could be released. On August 17, 1999, while in Work Force Rehab, he felt a pop in his back while lifting 65-pound weight in a milk crate. (Tr. 39). He also called Dr. Flores that day. After examining his back, Dr. Flores stopped the Work Force Rehab and sent Claimant for an MRI. (Tr. 40).

Dr. Flores continued to treat Claimant's knee and back problems. (Tr. 40). He also sent Claimant to physical therapy at Coastal Rehabilitation for his knee and back. Claimant recalled his knee was still buckling and his middle back was hurting. Dr. Flores continued to keep him off work. (Tr. 41).

Claimant testified that on April 28, 2001, he fell down the steps of First Baptist Church in Kiln, Mississippi when his right leg gave way. (Tr. 41). No one was with him when he fell. After he landed on the concrete pad, he felt pain in his right leg and could not get up. He called for help. (Tr. 42). Claimant used a walking cane prescribed by Dr. Flores, but did not have it when he fell down the stairs. (Tr. 42-43).

The church was being repaired in April 2001 by various contractors. Claimant recalled that his brother, Moses Hill, was the first person to see him after he fell. Moses Hill, was cleaning the church grounds on the day of the accident. (Tr. 61).

Claimant is a member and the business manager for the church. (Tr. 43). Reverend Harry Graham is the minister of the church. Claimant's mother, brother, and other family members are also members of the church. (Tr. 44).

Claimant recalled the first person he spoke with after the fall was one of the paramedics. Claimant's brother called the paramedics. Claimant stated the paramedic asked "you fell twenty feet?" and Claimant responded "no, I didn't fall twenty feet." The paramedic then put oxygen on his face. (Tr. 46).

Claimant confirmed there was a ladder near the site where he fell. He did not know which contractor owned it, but did know Robert Jackson, his brother-in-law, had been using it to spray-paint the church. Mr. Jackson was not on the ladder when Claimant's fall occurred. Claimant stated Mr. Jackson was "in the back eating lunch." (Tr. 47).

Claimant explained the ladder had been leaning-up against the steeple. (Tr. 47-48). The steeple has two doors and is the normal entrance of the church. There are no stairs from the steeple inside the church. Claimant testified he never told anybody he fell off a ladder on April 28, 2001. (Tr. 47).

Dr. Flores treated Claimant at Hancock Medical Center on the day of the fall and referred him to Tulane Medical Center for additional medical treatment. (Tr. 47-48). Dr. Kyle Dickson operated on Claimant's right hip and left foot. Dr. Dickson did not request any evaluation of any other problems Claimant might have had. He continues to see Dr. Dickson since the two surgeries. (Tr. 49).

Claimant testified he has not completely recovered from these injuries. (Tr. 49). Doctors are waiting to see what happens with the right hip. His left foot "is the best it's going to recover," since there is a plate and eight screws in it. Because the plate is not designed for uneven surfaces, he walks like he has a bad sprain and his foot swells up. The more he walks on it, the worse it gets. (Tr. 50).

When Claimant popped his back in August 1999 at Work Force Rehab, he requested that Employer/Carrier provide medical benefits for his back injury. However, to his knowledge, benefits were not provided. (Tr. 50). He also requested that Employer/Carrier provide medical benefits for the April 28, 2001 fall that injured his hip and foot, but his request was rejected. Instead, Claimant used his personal insurance with Blue Cross/ Blue Shield. (Tr. 51).

Claimant has not worked for any other employers since he worked for Gulf Coast Fabrications. His most recent medical

appointment was with Dr. Dickson, on May 15, 2003, for his hip and foot. (Tr. 51). Dr. Dickson has evaluated and examined Claimant's back and referred him to Dr. Ike, a spinal specialist at Tulane. (Tr. 51-52). Dr. Ike recommended that Claimant have surgery, but not at that time.⁵ Dr. Ike requested Claimant make an appointment to see Dr. Whitecloud, Jr. While under the care of Dr. Dickson, Claimant had an MRI in April 2003. (Tr. 52). He has not been paid worker's compensation benefits since July 13, 2001, nor has he been reimbursed for out-of-pocket medical expenses for the April 28, 2001 accident. (Tr. 52-53).

Claimant remembered speaking with Ms. Michelle Edwards on the telephone, but couldn't articulate who she was or what she did. Claimant maintains Ms. Edwards did not ask him how he was injured on either April 28, 2001 or August 17, 1999 in Work Force Rehab. (Tr. 53).

Claimant testified at the time of the hearing his right knee still buckles, his mid-back hurts, his right hip gets sore and hurts, and his left foot swells and feels like it is sprained. (Tr. 54-55). Claimant confirmed that Dr. Flores had retired in December 2002, and had not returned him to work. Dr. Dickson had also not released him to return to work. (Tr. 55).

On cross-examination, Claimant verified that on April 28, 2001, he rode alone in the ambulance and was conscious upon arrival at the hospital. (Tr. 56). He confirmed that the Emergency Room Encounter Record, dated April 28, 2001, stated an "AA" (African American) was "brought by AMR (American Medical Response), fell from ladder at least twenty feet." (Tr. 57). The Hancock Medical Center record, dated April 28, 2001, stated "[c]omplains of right hip, right leg pain, left ankle pain, onset thirty minutes, PTA-falling twenty feet from ladder, landing on right hip." The Hancock Medical Center Radiology Report, dated April 28, 2001, stated "Clinical History: Trauma, Patient fell off ladder." Dr. Flores's Hancock Medical Record stated "Forty-two year old black male who weighs 236 pounds, who fell off ladder and sustained injury to his right lower extremity." (Tr. 58). The Hancock Sheriff's Central Complaint Card also stated complainant was Moses Hill and "42 YOA fell off ladder" was written under the note section. (Tr. 59). The American Medical Response report, dated April 28, 2001, stated "[p]atient fell twenty feet from ladder, onto concrete dirt surface." (Tr. 60). Finally, Dr. Flores stated in a letter of

⁵ "Dr. Ike's" medical records and opinions are not contained in the record.

referral to Dr. Dickson that Claimant "fell from a ladder and sustained a fractured dislocation of the right hip." (Tr. 62).

Claimant disagreed with the records of Dr. Flores and occupational therapist Stacey Shepherd that the work hardening program required him to attend five, eight hour days, because Ms. Shepherd told him he would work his way up to an eight hour day. (Tr. 66). Claimant also remembered he could not perform some of the gripping tasks because he had stitches and a brace on his thumb. (Tr. 67). He was not aware that Ms. Shepherd observed him on several occasions, during simulated work tasks, demonstrate full ability to grip using his thumb. Claimant was also unaware that Ms. Shepherd saw him immediately after he reported the pop in his back to converse with the therapist and move about the clinic with no pain posturing, facial grimacing, or limping. (Tr. 68). Finally, Claimant was unaware he had tested positive on a Waddell's test administered by Ms. Shepherd, indicating symptom magnification. (Tr. 69).

Claimant initially refused trigger point injections for his back by Dr. Graham and Dr. Jackson, but then underwent the treatment with Dr. Graham six or eight months later. He claimed he told Dr. Graham of the problems with his knees, and that the doctor's medical reports stating he had no problems with his knee giving way were incorrect. (Tr. 70). He testified he told Dr. Flores about his knee buckling and that it was an "oversight" if the doctor left it out of his medical reports. (Tr. 71-72). He stated it was an "oversight" if Ms. Shepherd's reports did not mention anything about his knee buckling or his complaints about it buckling, because he did report the problem to her when she asked why he climbed the ladder "leg over leg." He claimed it was an "oversight" that physical therapist Jay Pullman's reports did not mention knee buckling. (Tr. 74-75). Finally, he told Dr. Dickson about his knee buckling, but Dr. Dickson told Claimant he "didn't work on the knee, so he's not going to look at it." (Tr. 75-76).

Claimant explained Dr. Dickson was "joking" at his deposition when the doctor asked him why he was walking with a cane and stated he needed to get rid of it. He further maintained that despite what the medical records reflect, he had fallen on the church steps. (Tr. 77).

Claimant confirmed he had not received compensation after July 2001, the date Employer, Reliance, and MIGA learned about the fall involving his hip. He also agreed he had advised his attorney's office of the fall, because he could not attend his

appointment with Dr. Jackson. However, he denied telling Mary at his attorney's office that he fell from a ladder, and stated she must have been "incorrect" when she told the nurse case manager he fell from a ladder. (Tr. 78).

Claimant further agreed he had received a settlement of about \$30,000.00 for a workers' compensation claim in the past. (Tr. 79). He also wrote the adjustor, Sheila Taylor, within months of his original injury, before he had surgery in February 1999, and asked for pain, suffering, lost wages and future surgery which may be necessary. (Tr. 79-80).

Claimant affirmed Dr. Flores was to release him to return to work after he completed the work hardening program. (Tr. 80). Claimant has not sought employment with any employer besides Gulf Coast Fabrications. (Tr. 80-81). He had been released to do light-duty work, and went back to Employer for a short time after the first surgery and again after the second surgery. When he went back the second time in July 1999, he was terminated. (Tr. 81). At that time, Dr. Flores told Claimant he had to complete work hardening before he would release him. (Tr. 82). A Functional Capacity Evaluation in May 1999 demonstrated he could work with limitations, and Dr. Flores's July 1999 report reflected he could do light-medium work. (Tr. 83).

On re-direct examination, Claimant confirmed Dr. Dickson had corrected a mistake made in his medical records by changing the original cause of injury from car wreck to falling at church. (Tr. 85). Claimant further acknowledged telling Jay Pullman, a physical therapist, about the give-way in his knee. When questioned about his October 1998 letter to Sheila Taylor wishing to resolve his claim, he agreed he was not represented by an attorney at that time. (Tr. 86).

Jay Pullman, a physical therapist, had prescribed a Protonic knee brace for his right knee to help support it from buckling. (Tr. 88). Claimant agreed that Jay Pullman's letter dated April 20, 2003, did not state whether Claimant had complained of his knee giving way. Nor did Mr. Pullman's records reflect such a complaint. The letter referred to what Claimant had told Mr. Pullman after the hip injury; his knee gives way. (Tr. 91).

Reverend Harvey Graham

Rev. Graham is the pastor at the First Baptist Church in Kiln, Mississippi. (Tr. 92). He knows both Kevin and Moses Hill, who are both members of his church. (Tr. 92-93). Rev. Graham confirmed Robert Jackson was using a ladder to paint the church on April 28, 2001. (Tr. 93-94). He saw Claimant on that date, but was not aware of any work Claimant might be doing at the church. He did not see Claimant fall, but did see him lying on the ground. He did not speak to Claimant after the accident. (Tr. 94). Rev. Graham testified he did not know how Claimant fell because he was "in the back." (Tr. 94-95).

Rev. Graham remembered Claimant telling him he was having trouble with his knee and seeing him walk with a cane. (Tr. 95).

On cross-examination, Rev. Graham confirmed he sees Claimant every Sunday when Claimant attends church. (Tr. 95-96). He recalled telling private investigator Fred Phillips a month prior to the hearing that someone had come to the back and reported Claimant had fallen. He told Mr. Phillips "someone" had told him right after the accident that Claimant fell off the ladder, but he could not remember who told him. Claimant was conscious and did not deny to Rev. Graham falling off the ladder. (Tr. 97).

Rev. Graham told Mr. Phillips that the Sheriff's Department and AMR had been called the day of the accident. (Tr. 97-98). He also told the investigator the church was having a workday on that Saturday, but only Claimant, Moses Hill, Robert Jackson and Rev. Graham were there. He did not recall whether the painter was up on the ladder when he came out of the church. He agreed one of the other three told him Claimant fell from the ladder. (Tr. 99).

Rev. Graham thinks he has seen Claimant twice since he spoke with Mr. Phillips a month before the hearing. (Tr. 100). He denied talking with Claimant or Moses Hill about his testimony.

On re-direct examination, Rev. Graham agreed somebody from AMR could have told him Claimant fell off the ladder. (Tr. 101). He recalled he saw the ladder on the ground away from Claimant. (Tr. 102).

On re-cross examination, Rev. Graham confirmed he saw the ladder on the ground when he came outside of the church. (Tr. 103). Further clarification indicated he saw the ladder approximately twelve feet from Claimant. (Tr. 105). He did not recall whether he arrived at the scene before or after the ambulance arrived. (Tr. 104). He had seen the ladder leaning up against the building near the left side, the same side on which Claimant fell, earlier that morning. (Tr. 104-105).

Moses Hill

Mr. Hill testified at the hearing and was deposed by the parties on May 16, 2003. (EX-25). Mr. Hill is Claimant's brother. He has worked as a traffic officer at Stennis Space Center since 1984. He was present the day Claimant fell at the church. (Tr. 107). He confirmed that Robert Jackson was painting the church that day, while he did whatever else needed to be done. He explained there is a cement pad and cement stairs leading to double doors at both steeples. Mr. Hill was working on the east side of the church when he heard someone yell. He went around to the south side and discovered Claimant on the cement pad. (Tr. 108).

Mr. Hill observed a scratch or bruise on Claimant's head, and recalled Claimant complaining of pain in his hip. Claimant told him he had fallen. Mr. Hill noticed a ladder standing up against the steeple. He testified Claimant had not been painting the church on the day of the fall, and that Claimant's duties consisted of mostly overseeing activities and functions. (Tr. 109).

Mr. Hill called "911" and reported that Claimant had fallen from a ladder. Mr. Hill assumed Claimant had fallen off the ladder because he had found Claimant "up under the ladder." Before the day of the fall, Mr. Hill had never discussed with Claimant any problems Claimant was having with his right knee. However, he knew Claimant was having problems with his right knee. (Tr. 110).

On cross-examination, Mr. Hill clarified the ladder was standing up against the church when he discovered Claimant. He drew a ladder on a photograph during his deposition to indicate the ladder's placement. (Tr. 111). However, he had not recalled the presence of a ladder at the beginning of his deposition taken four or five days before the formal hearing. (EX-25, p. 10). In fact, he stated a ladder was not involved in Claimant's accident at the church. Id. He claimed he initially

did not remember because the event had occurred over two years before. (Tr. 112).

When questioned about calling "911", Mr. Hill explained he was not aware that his call went to the Sheriff's Department. (Tr. 113-114). Mr. Hill remembered the ladder during his deposition after being shown the Sheriff's Department report with a notation that someone "reported that an individual fell off a ladder." He explained the information had jogged his memory. (Tr. 115).

Mr. Hill further testified that Rev. Graham may have seen the ladder on the ground because he arrived a couple of minutes later and someone could have moved it by then. However, Mr. Hill did not recall whether he had moved the ladder to the ground or not. He did recall people were in and out of the church all day. However, Mr. Jackson was doing most of the painting work. (Tr. 116).

Mr. Hill agreed he did not know what Claimant was doing at the time of the fall because he was on the other side of the church. He knew Claimant was not painting because they had run out of paint. (Tr. 117). Again, Mr. Hill explained Claimant had only told him he had fallen, and that he had assumed Claimant had fallen off the ladder. (Tr. 118). He agreed it was possible he spoke with the AMR ambulance attendants and reported Claimant fell off a ladder. (EX-25, p. 15). He did not accompany Claimant to the hospital. (Tr. 119).

On re-direct examination, Mr. Hill recalled several people stopping by after the accident, but did not recall if any of them had moved the ladder. He confirmed he never saw Claimant on the ladder that day. (Tr. 120). In deposition, he reported that on the day of the accident Claimant informed him at the hospital that "his knee gave way and he stumbled or fell." (EX-25, p. 23).

Robert Jackson

Mr. Robert Jackson is a spray painter. (Tr. 151). He knows Claimant and Moses Hill. (Tr. 151-152). Mr. Jackson began spray-painting the First Baptist Church in Kiln early on April 28, 2001. He recalled Claimant was present when he began painting. (Tr. 152). Mr. Jackson confirmed he was using a ladder and had it leaning against the steeple. (Tr. 152-153). He testified he never saw Claimant climb up the ladder nor did he see Claimant fall. Mr. Jackson confirmed he had run out of

paint and someone had gone to purchase more paint. He did not know whether his ladder had been moved the day of the accident. He did not move it. The ladder was leaning against the steeple when he ran out of paint. (Tr. 153).

On cross-examination, Mr. Jackson recalled he was "in the back eating lunch" when Claimant's accident occurred. (Tr. 154). He affirmed he could not testify as to whether Claimant was on the ladder or not since he was not present at the scene of the accident. (Tr. 154-155).

He could not recall whether there were windows on the steeple he was painting, but did identify a photograph of the church. He could not confirm the area where Claimant fell since he was in the back of the church at the time of the accident. (Tr. 155). Rev. Graham was in the back with him "frying something." Another person was in the back with Mr. Jackson, but he could not recall who. He testified no one else was working on the church that day. He clarified that the ladder was against the steeple by the doors. When questioned whether he went outside after the accident, he replied "when I went outside, I think the ambulance was there, I believe." However, he could not recall where exactly Claimant or the ambulance were in relation to the church. (Tr. 156).

Mr. Jackson again affirmed he did not know where Claimant was or what Claimant was doing when he fell. He knew there was a ladder present because it was his ladder. The ladder was a twenty or twenty-five foot extension ladder that reached to about the windows on the steeple. He testified the ladder was still standing up against the steeple when the ambulance took Claimant away. He did not speak with anyone that day, nor did he tell anyone Claimant fell off the ladder. He recalled there were a lot of people at the accident scene, but could not remember who. He is not a member of the church. (Tr. 158).

Mr. Jackson is Claimant's brother-in-law. Claimant is married to Mr. Jackson's sister and has been for a "long time." He sometimes sees Claimant at family functions, but Mr. Jackson lives in Louisiana. He testified neither Claimant nor Moses Hill had spoken with him about his testimony or about what to say the day of the hearing. (Tr. 159).

Mr. Jackson noted he had seen Moses Hill at the church the day of the accident. He explained Claimant was lying on the ground with people around him, but was nowhere near his ladder. (Tr. 161). However, he could not recall exactly where Claimant

was laying down or whether he had been moved. Mr. Jackson agreed he had his ladder braced on the concrete pad located in front of the steps. He never knew the location where Claimant had injured himself. (Tr. 162).

Chris Powell

Mr. Powell has worked as an Emergency Medical Technician (EMT) for AMR for twelve years. (Tr. 123). He did not remember the incident or completing the medical report from April 28, 2001, but identified his signature and handwriting on the report. (Tr. 124; EX-24). The report stated "a patient fell twenty feet from a ladder onto concrete dirt surface." Mr. Powell testified the history in the report is important to everyone in the emergency medical industry to assess the mechanism of injury because it will affect how the injured person is treated. (Tr. 125). Judging from the treatment Mr. Powell administered, as noted in the report, he suspected a significant mechanism of injury, as a twenty-foot fall would indicate. He would have obtained this history from a combination of first responders, other bystanders, the patient, and what he observed at the scene. Mr. Powell accompanied Claimant to the hospital. A copy of his report is in the hospital chart. (Tr. 126).

Mr. Powell did not remember seeing Mr. Hill or a ladder at the church. (Tr. 126). However, he would have made a notation in his report if Claimant had told him he did not fall off a ladder. (Tr. 126-127). He would not have noted Claimant fell off a ladder if Claimant told him he did not fall off a ladder. Mr. Powell has completed thousands of such reports in his thirteen years as an EMT. (Tr. 127).

On cross-examination, Mr. Powell could not identify, by looking at his report, who had contacted AMR. (Tr. 127). He verified he wrote the report the day of the accident. (Tr. 127-128). He never spoke with Dr. Flores about Claimant's accident, and he did not remember specifically asking Claimant what happened on the day of the accident. He agreed there were other people at the scene from whom he could have obtained information. (Tr. 128).

On re-direct examination, Mr. Powell confirmed Claimant was conscious based on his record. (Tr. 129). The record stated he was "AAO 3", meaning alert, awake, and oriented as to "person, place and time." To make that observation, Mr. Powell would

have had to speak with Claimant, whether he remembered speaking with him or not. (Tr. 129).

Fred Phillips

Mr. Fred Phillips is the owner of Private Investigation Company. He has been employed as a private investigator for nineteen years. (Tr. 130). Mr. Phillips ran surveillance on Claimant and interviewed Rev. Graham on May 4, 2003. (Tr. 131).

Mr. Phillips testified Rev. Graham told him he was in the back of the church when someone reported Claimant had fallen. (Tr. 131-132). He immediately went out to where Claimant was laying down. Rev. Graham told Mr. Phillips that Claimant told him he had fallen off the ladder while trying to put black paper up around a window to be painted on the steeple or the bell tower. Rev. Graham also reported that Claimant told him the ladder either "slipped, moved, or gave way with Claimant on the ladder," and Claimant "rode the ladder all the way down to the ground." (Tr. 132).

Mr. Phillips spoke with Rev. Graham less than one month before the hearing on May 4, 2003. (Tr. 132-133). They spoke inside the church and never went outside to the scene of the accident. (Tr. 133). Mr. Phillips testified there was only one steeple outside the church, located on the southwest corner. (Tr. 134).

On cross-examination, Mr. Phillips admitted he did not take a signed statement from Rev. Graham when he interviewed him. (Tr. 134).

Mari Weidner

Ms. Mari Weidner has been a legal assistant at Claimant's attorney's firm for twelve years. (Tr. 139-140). Ms. Weidner did not recall having a conversation with Michelle Edwards, a Medical Case Manager with the EOS Group, regarding Claimant falling off a ladder. However, she would not disagree if Ms. Edwards claimed they had such a conversation and it was documented in the correspondence. (Tr. 140).

On cross-examination, Ms. Weidner explained she reviewed Claimant's file prior to the hearing and did not find any notes of a conversation with Michelle Edwards. (Tr. 142-143). She agreed she would have expected to find file notes if she had such a conversation. She also did not recall Claimant ever

telling her that he injured himself by falling off a ladder. (Tr. 143).

On re-direct examination, Ms. Weidner confirmed there would have been notes documented in the file if she had spoken with Ms. Edwards, "[e]specially on a Longshore case, because it's billable hours, and so you document everything that you do." (Tr. 143). However, Ms. Weidner maintained she could not remember whether she did or did not have a conversation with Ms. Edwards. (Tr. 144).

Michelle Edwards

Ms. Michelle Edwards has been a Medical Case Manager for approximately eight or nine years. She verified she has been involved with Claimant's case. (Tr. 145). She testified she spoke with Ms. Mari Weidner from Claimant's attorney's office about Claimant's case while working for Frank Gates and Donna Hill at EOS Group. She confirmed a July 9, 2001 letter sent to Donna Hill updating her on the status of Claimant's case as follows:

I spoke with Mari of Tommy Dulin attorney's office today. She advised me Mr. Kevin Hill would not be attending his rescheduled appointment on 7-17-01, with Dr. Joe Jackson, to begin his work conditioning program. According to Mari, Mr. Hill is recovering from a crushed hip injury he sustained when his right knee gave out causing him to fall off a ladder. I requested Mari to suggest Mr. Dulin follow up with you via letter. The appointment with Dr. Jackson will be canceled through this office. (Tr. 146; EX-21).

Ms. Edwards testified she received this information from Ms. Weidner through a voice message, then called her back to discuss it. She confirmed Ms. Weidner had definitely told her Claimant had fallen from a ladder. (Tr. 147).

On cross-examination, Ms. Edwards agreed she never discussed the accident of April 28, 2001 with Claimant. She thought she may have sent him a letter, but never met him. (Tr. 147). She identified Laurie Lee as a Medical Case Manager working for EOS Group. Ms. Lee had done some work on Claimant's file for Ms. Edwards. She could not recall whether Ms. Lee had contact with Claimant's attorney's office. She verified that no copy of the July 9, 2001 letter was sent to Claimant's attorney's office or to Claimant. (Tr. 148). Ms. Edwards did

not recall seeing any letter that Claimant's attorney may have sent to Donna Hill in response to the alleged conversation. (Tr. 149).

The Medical Evidence

Dr. Victor Bazzone, M.D.

On September 23, 1985, Dr. Bazzone first examined Claimant for low back pain with radiation of pain into the right leg and numbness in the right leg. Claimant reported injuring himself on the job when the tractor he was riding flipped over backwards and threw Claimant to the ground. A CT scan revealed a bulge at L4-5. (EX-7, p. 1). Dr. Bazzone diagnosed Claimant with a herniated nucleus pulposus at L4-5. (EX-7, p. 2).

On October 7, 1985, Dr. Victor Bazzone performed a lumbar laminectomy and discectomy at L4-5 and exploration of L5-S1. (EX-7, p. 3). Post-operatively, Claimant had lost the majority of his low back and leg pain and was ambulating independently. (EX-7, p. 5).

On July 15, 1986, Claimant was admitted to Garden Park Community Hospital for continued low back pain. Dr. Bazzone performed a lumbar myelogram to investigate the pain and found a "ventral defect at L4-5 indicating bulging disc material and probably a central disc herniation." (EX-7, pp. 6-7). Dr. Bazzone advised Claimant to undergo surgery to remove the herniated disc. (EX-7, p. 8).

On October 27, 1986, Claimant was admitted to the hospital and underwent surgery which revealed evidence of adhesions at L4-5. Dr. Bazzone performed a lysis of the adhesions at L4-5. Post-operatively, Claimant had normal wound healing and was pain free. (EX-7, p. 12).

Dr. Bazzone reported that Claimant "had reached maximum medical benefit and could be returned to gainful employment on February 10, 1987." (CX-16).

Dr. Richard Peden, M.D.

On June 16, 1998, Dr. Peden examined Claimant after he fell and hit his right knee on a piece of steel while working for Employer. Dr. Peden diagnosed Claimant with a contusion of the right patella and prescribed Ultram, a knee immobilizer, and ice and elevation for twenty-four hours. Dr. Peden released

Claimant to light duty work with no climbing, kneeling, or squatting. (CX-15).

Tomas Flores, M.D.

The parties deposed Dr. Tomas Flores on June 30, 2003. Dr. Flores retired from orthopedic practice on December 15, 2002, after twenty-seven years. (EX-9, pp. 4-5).

Dr. Flores testified he first examined Claimant on June 18, 1998, for his right knee injury. (EX-9, p. 5). Claimant was diagnosed with pre-patellar bursitis of the right knee with a fusion or an accumulation of fluid in an area between the bursa. (EX-9, pp. 6-7). The pre-patellar bursa is a sac located on top of the kneecap outside the knee joint. Dr. Flores attempted to aspirate the bursa, but could not do so because of internal blood clots. His office notes for that visit do not reflect any complaints by Claimant of his knee giving-way or buckling. (EX-9, p. 7).

On June 19, 1998, Dr. Flores satisfactorily aspirated the bursa in an outpatient procedure in the operating room. (CX-9, p. 70). On June 23, 1998 and June 29, 1998, Claimant presented for follow-up.

On July 6, 1998, Claimant's incision had healed, but he still had some procedural swelling around the bursa. Claimant's next visit with Dr. Flores was on July 30, 1998. (EX-9, p. 9). Since the incision was well-healed and the swelling of the bursa was gone, he gave Claimant a return-to-work slip for July 15, 1998. Claimant returned to Dr. Flores on July 23, 1998, after he had resumed regular-work duty, with swelling and pain of the bursa. At that time, Claimant was prescribed and underwent physical therapy. (EX-9, p. 10).

Claimant's next visit with Dr. Flores was on September 14, 1998. He complained of pain in the bursa area, where the doctor observed scar tissue. Swelling was not present. Dr. Flores injected the area with a numbing medicine, which Claimant reported provided pain relief. There were no reports of Claimant's knee giving-way or buckling at that time. (EX-9, p. 11).

Dr. Flores kept Claimant from working and in physical therapy until December 14, 1998, when Claimant returned to Dr. Flores complaining of persistent pain on top of his knee, but again did not mention knee buckling or giving-way. Claimant

underwent an MRI with normal results. Claimant again returned to Dr. Flores on December 28, 1998, with the same complaints. (EX-9, p. 13). Upon physical examination, Dr. Flores noted some tenderness on top of the bursa. Again, Claimant did not mention knee buckling or giving-way.

On February 2, 1999, Dr. Flores excised the bursa without any complications. (EX-9, p. 14; CX-9, p. 57). Dr. Flores estimated the maximum medical recovery (MMI) for such a procedure would be three weeks. He estimated the staples were removed three weeks after the procedure on February 25, 1999. (EX-9, p. 15).

Claimant next saw Dr. Flores on April 5, 1999, complaining of right knee pain aggravated by movement. (EX-9, pp. 15-16). Dr. Flores noticed tendonitis and advised Claimant to continue physical therapy and prescribed Celebrex, an anti-inflammatory drug. (EX-9, p. 16).

On May 4, 1999, Claimant visited Dr. Flores regarding right knee pain on lateral movements. According to Dr. Flores's records, Claimant did not mention knee buckling or giving-way. However, during his deposition, Dr. Flores suggested pain on lateral movements could be a sign of buckling. (EX-9, p. 16).

Dr. Flores next saw Claimant on July 26, 1999 to discuss a prescribed functional capacity evaluation (FCE) with or without work hardening. The FCE concluded Claimant could only be employed for light work. (EX-9, p. 17). Dr. Flores did not release Claimant to return to work at that time; he advised Claimant to find out if there was light work available for him with Employer. When Claimant visited Dr. Flores on August 9, 1999, he explained there were no available light jobs at Employer. Dr. Flores opined Claimant would not have been at maximum medical improvement from the excision of the bursa at this time. (EX-9, p. 18).

Dr. Flores prescribed work hardening during the August 9, 1999 visit. On August 30, 1999, he was notified Claimant hurt his back lifting weights during work hardening. Claimant presented on September 2, 1999 with his main complaint of back pain. (EX-9, p. 19). He refused to return to work hardening. Stacey Sheppard, the work hardening occupational therapist, sent Dr. Flores a letter on August 31, 1999, noting "immediately following the pain report, client was noted to converse with therapist and to move about the clinic with no pain posture and no facial grimacing and no limping noted," after Claimant

reported his current pain as a ten on a scale from one to ten, where ten is unbearable. (EX-9, pp. 20-22; CX-9, p. 27). Ms. Sheppard also reported Claimant scored positive on all three Waddell's tests administered, indicating symptom magnification. (EX-9, p. 23).

On October 4, 1999, Claimant visited Dr. Flores complaining of lower back pain. Dr. Flores put the work hardening on hold and recommended an MRI of the spine. (EX-9, p. 23). Claimant had no complaints about his knee during this visit. On October 18, 1999, Dr. Flores saw Claimant and noted the MRI showed some degenerative changes on his spine secondary to his two back surgeries performed in the mid-1980s. He recommended and Claimant underwent work conditioning, not hardening, at Coastal Rehab. (EX-9, p. 24).

Claimant next saw Dr. Flores on November 30, 1999, complaining about back pain. He had no complaints about his knee. Another MRI was performed on the dorsal spine with negative results. Dr. Flores continued the work conditioning and prescribed Scalactin, a muscle relaxant. (EX-9, p. 25).

Claimant returned to Dr. Flores on January 21, 2000, after seeing Dr. Graham. He complained of back pain, but not knee pain. Dr. Flores advised Claimant to continue work conditioning at Coastal Rehab. Claimant next visited Dr. Flores on March 2, 2000, complaining of back pain. Claimant did not mention his knee. (EX-9, p. 26). Dr. Flores directed Claimant to continue rehab and return after he was discharged from rehab. (EX-9, p. 27).

On April 28, 2000, Claimant returned to Dr. Flores complaining about neck pain going down to his tailbone. He had no complaints about his right knee.

Claimant next saw Dr. Flores on May 18, 2000, complaining of lower back pain. Claimant did not mention any knee problems. (EX-9, p. 27). He advised Dr. Flores that he had been terminated by Employer and discharged by Coastal Rehab. (EX-9, p. 28). Dr. Flores sent Claimant to Dr. Joe Jackson for an independent neurological evaluation. (EX-9, p. 29).

On September 2, 2000, Claimant visited Dr. Flores complaining of worsening upper back pain. There was no mention of his knee. (EX-9, p. 30).

On October 7, 2000, Claimant complained of middle-upper back pain. He did not mention his knee. Dr. Flores sent Claimant back to Dr. Jackson for acupuncture and advised him to follow-up with Dr. Jackson regarding the treatment for his back. (EX-9, pp. 31-32).

Claimant's last office visit with Dr. Flores was on March 27, 2001. (EX-9, p. 32). He complained of back pain, but no knee pain. He was still treating with Dr. Jackson for acupuncture. Dr. Flores testified Claimant had no complaints regarding his knee after he injured his back in physical therapy. (EX-9, p. 33).

Dr. Flores deferred to Dr. Jackson's opinion of June 15, 2000, that Claimant was at maximum medical improvement for his back and could return to work at a light sedentary level. (EX-9, pp. 34-35; EX-10, p. 2).

Dr. Flores last examined Claimant in April 2001 in the emergency room after Claimant fell and injured his hip. (EX-9, p. 37). Dr. Flores's discharge summary states "[a] 42 year old black male who weighs 236 pounds who fell off the ladder and sustained injury to his right lower extremity." Dr. Flores explained he obtained the information from the emergency room doctor's history because Claimant "was in agony." (EX-9, p. 38).

In a letter to Dr. Kyle Dickson in May 2001, Dr. Flores again stated Claimant had fallen off a ladder. (EX-9, p. 39). Dr. Flores agreed there was no mention of Claimant's knee buckling or giving-way in the letter or in the emergency room records. (EX-9, p. 40). Dr. Flores suggested that Claimant may not have paid attention to his right knee after his work hardening injury because the pain in his back was so intense and he was using a cane. (EX-9, p. 41).

Dr. Flores agreed he had speculated in in his June 17, 2003 report that Claimant's fall on April 28, 2001, was caused by his knee giving-way. (EX-9, pp. 44-45). He also had no reason to doubt the history recorded by Hancock Emergency Room. (EX-9, p. 45). He was not aware that Claimant had testified he had not fallen from a ladder. (EX-9, p. 46).

Dr. Flores acknowledged that in June 2000 Dr. Jackson related any impairment in the lumbar spine to Claimant's pre-existing back injuries and could not attribute any direct percentage of impairment to his "current trauma." (EX-9, p.

50).

Dr. Flores agreed that if Claimant's knee had given-way, it could have been related to either his prior back injury in the 1980s or from the recent torn ligament in his back. He testified the American Medical Association Guides do not provide for an impairment rating for the removal of a bursa since it is outside the joint. (EX-9, pp. 50-51). Nonetheless, when answering questions posed by Claimant's attorney in a letter dated April 24, 2003, two years after last examining Claimant, Dr. Flores assigned an impairment rating to Claimant's right knee as a result of his June 16, 1998 job accident, based on "something" that was closest to Claimant's situation. (EX-9, p. 51). Dr. Flores did not re-evaluate Claimant, but instead used his previous records and the emergency room history to form his opinions. (EX-9, p. 52). He also assigned an impairment rating for Claimant's back in his June 17, 2003 response. (EX-9, p. 52). Dr. Flores admitted he did not have all of Claimant's medical history when he assigned a back impairment rating because he was missing Dr. Jackson's report from January 2002. (EX-9, p. 53). Dr. Flores testified a patient would normally achieve maximum medical improvement and be released to return to work six weeks after having the bursa excised if there were no complications or residual problems. (EX-9, pp. 54-55).

On cross-examination, Dr. Flores agreed he had received Dr. Graham's deposition along with a letter from Claimant's attorney dated April 24, 2003. (EX-9, p. 55). He explained he did not respond to the April letter until June 2003 because his wife became ill. (EX-9, p. 57).⁶

⁶ Claimant offered both letters as exhibits nos. 2 and 3, respectively, to Dr. Flores's deposition. Employer/Carrier objected to the exhibits since the deposition was conducted post-hearing and the June 17, 2003 letter was not provided to Counsel for Employer/Carrier until June 19, 2003, also after the May 21, 2003 hearing. The record remained open for the purpose of obtaining Dr. Flores's deposition and was not closed at the hearing as argued by Employer/Carrier. Since Counsel for Employer/Carrier examined Dr. Flores about his opinions expressed in the June 17, 2003 letter, I find the document should be received in conjunction with his testimony as the best evidence of his expressed opinions. It is also noted that Counsel for Claimant initially sought Dr. Flores's opinions in a letter dated April 24, 2003, before the formal hearing, and the June 17, 2003 letter is a response thereto. Accordingly,

Dr. Flores clarified he had not been involved in the treatment of Claimant's back injury in 1985 and 1986. Instead, he had referred Claimant to Dr. Vic Bazzone, who later performed two back operations on Claimant. (EX-9, p. 57). Dr. Flores knew Claimant had returned to heavy work in the shipyards following his back operations for many years until he injured his knee in June 1998. (EX-9, pp. 57-58). He never treated Claimant for any back problems between 1985 and June 1998. Dr. Flores never evaluated Claimant's back after Claimant injured it in work hardening. He prescribed the muscle relaxant Scalactin and Lortab-10 for pain control, and then referred him to Dr. Jackson. (EX-9, pp. 58-59).

On April 28, 2001, Dr. Flores performed a closed manipulative reduction on Claimant's fractured, dislocated hip. After a CT scan, Dr. Flores referred Claimant to Dr. Dickson to repair the hip in surgery. Dr. Flores could not recall having any discussions with Claimant in his hospital room after the procedure. (EX-9, p. 61). He also could not recall having any conversations with Claimant following the accident on June 16, 1998, regarding his knee giving-way. (EX-9, p. 62). Dr. Flores testified he would anticipate residual or permanent effects from the surgical procedure performed on Claimant's hip; specifically, degenerative osteoarthritis. (EX-9, p. 63).

When questioned whether he had ever released Claimant to return to work, Dr. Flores responded "we tried." Dr. Flores released Claimant after the incision and drainage of the bursa. However, he later had to remove the bursa, causing immobilization of Claimant's right knee and physical therapy.

On re-direct examination, Dr. Flores agreed the possible need for further tests by Dr. Jackson, referred to in his December 7, 2000 report, were for a new complaint. Claimant had complained of left arm numbness and pain. Dr. Jackson reported:

"[w]e have no basis to explain what the arm numbness might be due to, but have suggested that he might wish to consider obtaining an MRI of the cervical spine and an EMG/nerve conduction study of the left arm . . . but this I cannot substantiate, and he would have to have substantiation that it was indeed work-related."

exhibits nos. 2 and 3 to the deposition of Dr. Flores are hereby received into evidence as part of EX-9.

(EX-9, pp. 65-66; CX-13, p. 5). Dr. Flores also clarified the additional work hardening prescribed by Dr. Jackson in his March 8, 2001 report, was within a month before Claimant injured his hip. (EX-9, p. 66).

Rehability Center Medical Records

On July 31, 1998, Claimant was evaluated at Rehability Center following a referral from Dr. Flores for his right knee injury. Claimant attended rehabilitation three times a week for two weeks. (EX-16, pp. 1-3).

On May 13, 1999, Dr. Flores referred Claimant to Rehability Center for a Functional Capacity Evaluation. The report indicated maximum effort was given by Claimant with no symptom magnification. Claimant was assigned a physical demand category of "light medium work", thus not meeting the physical demands for his former job as an electrician/maintenance worker. The report also indicated the lack of knee mobility may put excessive strain on Claimant's lumbar spine. (EX-16, p. 5).

Work Force Rehab Medical Records

On August 17, 1999, Claimant underwent a work hardening baseline evaluation at Work Force Rehab following a referral from Dr. Flores. Before beginning the program, Claimant reported a "dull aching" in the center of his lower back and "stabbing" in his right knee. (EX-17, p. 24). The occupational therapist, Stacey Shepherd, concluded Claimant was "able to perform work at the medium work level as defined by the Department of Labor," but had not demonstrated the ability to perform the tasks of his former heavy job. Ms. Shepherd recommended an eight hour per day, five day per week, work hardening program. She also noted Claimant was "very motivated" to participate in rehabilitation and return to work. (EX-17, p. 36).

Claimant began work hardening on August 30, 1999. After four hours of simulated work tasks, Claimant voluntarily terminated the program for that day because of "stabbing" in the lower back, "pins/needles" in the anterior aspect of the right knee and "numbness" in bilateral lower extremities. He rated his current pain to be a 10 on a 0-10 scale. Ms. Shepherd administered the Waddell's Test and noted Claimant scored positive for symptom magnification. She also noted Claimant had inconsistent straight leg raising tests in the supine and seated positions. She observed Claimant conversing with a therapist

and moving about the clinic with no pain posturing, facial grimacing or limping after the back pain report. (EX-17, p. 10). Claimant did not return to the work hardening program. (EX-17, p. 1).

Coastal Rehabilitation of Bay St. Louis Medical Records

On October 19, 1999, Claimant presented to therapy following a referral from Dr. Flores with the chief complaint of right knee pain, pulling and weakness. He also complained of mid-back pain. (CX-12, p. 83). Claimant attended two rounds of rehabilitation for his knee, consisting of thirty-one treatments, between October 19, 1999 and February 22, 2000. (CX-12, pp. 1-24).

In a letter dated January 6, 2000, physical therapist Mr. J. Pullman noted Claimant had minimal complaints of on-again, off-again pain and reported weakness in his knee. Claimant's primary concern was "no longer his knee." Mr. Pullman fit Claimant with a protonic knee brace, opined he had gained maximal benefit from rehab at that time and recommended his discharge. (CX-12, p. 51).

On February 21, 2000, Dr. Flores referred Claimant to therapy for his mid-back pain. His chief complaint was a "catch" in his mid-back that sends pain into his cervical spine. (CX-12, pp. 24, 34). Claimant underwent physical therapy until May 5, 2000. (CX-12, p. 2).

In a letter dated April 20, 2003, Mr. Pullman answered two questions posed by Claimant's attorney: 1) whether Claimant had satisfactory rehabilitation on his quadriceps; and 2) whether he was aware that Claimant had give-way in his injured leg. Mr. Pullman stated Claimant's knee did not fully recover. Claimant "did not return to 'normal', nor did he show substantial progress over this period of time." According to Mr. Pullman, these two criteria would merit discharge.

Additionally, Claimant's back pain limited his knee rehabilitation. Despite exhausting their best efforts, Claimant never reported or demonstrated significant progress for his back. Because Claimant had satisfied Mr. Pullman's clinical standard for discharge, he opined Claimant had satisfactory rehabilitation of his quadriceps.

Regarding whether Mr. Pullman knew whether Claimant had give-way in his injured leg, he noted Claimant "is a memorable

individual, and though I recall him relating this injury to his right leg 'giving way', it is not specifically mentioned in my files." (CX-12, p. 2).

Dr. Ronald Graham, M.D.

The parties deposed Dr. Ronald Graham on April 8, 2003. Dr. Graham is a licensed, board-eligible orthopedic surgeon in Mississippi. (CX-17, p. 4). He has privileges at three hospitals and three outpatient surgery centers. Both parties stipulated to Dr. Graham's qualifications as an expert in the field of orthopedic surgery. (CX-17, p. 5).

Dr. Graham first saw Claimant as a post-operative referral for a second opinion on December 22, 1999. (CX-17, pp. 5-6). He was aware of Claimant's history regarding his knee, including the surgery to drain a hematoma within the pre-patellar bursa of the right knee. (CX-17, p. 6). Upon physical examination, Dr. Graham noted Claimant had a well-healed transverse incision with no evidence of infection, skin adhesions, or abnormal scar formation. He found the knee to be stable, with Claimant having some pain over the proximal tibia normally seen in people with gait disturbance, those involved in exercise programs, and following knee surgery. Dr. Graham diagnosed Claimant with Pes Anserine bursitis, which is tendinitis "just below the knee by about three inches on the inside of the leg." He also noted Claimant to have marked quadriceps atrophy. Claimant informed Dr. Graham that if he did not wear his knee brace, his knee "buckled out from underneath him." Dr. Graham testified this would indeed be true if Claimant had weak quadriceps because he would not have the strength to support his body weight. (CX-17, p. 8).

Dr. Graham opined that such weakness could be related to Claimant's knee injury and subsequent surgery, especially since Claimant did not walk normally after he developed bursitis and following his surgery. (CX-17, p. 9). However, he also indicated it could be due to the back surgery Claimant had in the mid-1980s.

Dr. Graham recommended the quadriceps atrophy be treated with an aggressive physical therapy program to re-stabilize the knee. He did not know whether Claimant agreed to undergo therapy since the attending physician would actually write the order. (CX-17, p. 10).

Dr. Graham testified, based upon reasonable medical probability, that Claimant's knee injury did not result in any permanent impairment because the bursa is not a part of the knee. (CX-17, p. 11). He explained the body will replace the excised bursa with a rudimentary bursa. The American Medical Association Guidelines to the Evaluation of Permanent Impairment give impairment ratings for joint mobility problems that are permanent, and for certain strength deficits that are permanent and secondary to neurological conditions. Dr. Graham stated since the bursa and the excision surgery were completely outside the knee joint, and Claimant recovered completely, there would not be an assignment of permanent impairment for the knee. (CX-17, p. 12).

Dr. Graham clarified that even if Claimant rehabilitated his quadriceps after six to eight weeks of hard physical therapy, he would still have a work restriction of no kneeling or crawling for approximately ten months until the surgical scar matured. (CX-17, p. 13). He did not, nor would he, assign Claimant any permanent work restrictions even assuming rehabilitation of the quadriceps. Dr. Graham explained an EMG study would have to be performed to distinguish whether the quadriceps atrophy was the result of Claimant's previous back injury or his knee injury. (CX-17, p. 14).

Claimant informed Dr. Graham of his prior back surgery and his back injury during the work hardening program. (CX-17, pp. 15-16). Dr. Graham testified Claimant's pain was consistent with an interspinous ligament tear and that this diagnosis would fit Claimant's description because his back was sore to direct pressure and popped with pain while participating in a work hardening program, which is not uncommon. (CX-17, p. 16). Dr. Graham found no neurological deficit after examination. (CX-17, p. 17).

Dr. Graham testified Claimant's back injury during work hardening would not result in any permanent impairment. However, Claimant would have temporary work restrictions of limited carrying overhead, climbing scaffolds, ropes or poles and 20 pounds lifting. In a letter dated January 13, 2000, Dr. Graham divided Claimant's disability status into several parts. (CX-17, p. 18). Regarding the pre-patellar bursa excision, Claimant could return to work with no restrictions. Claimant would have no impairment in the knee relative to the bursa excision. However, Claimant had a quadriceps deficit, which would prevent him from running, jumping, and climbing. Until he rehabilitated those muscles and completed a cybex evaluation,

those restrictions would remain in place. Finally, Dr. Graham noted Claimant's back injury appeared to be strictly soft tissue since he had a normal neurological examination. (CX-17, p. 19).

Dr. Graham clarified that the restrictions related to Claimant's back would last as long as it takes an innerspinous ligament to heal, which is four months. He would not have assigned any permanent restrictions with regard to Claimant's back. (CX-17, p. 20).

Dr. Graham was asked to re-evaluate Claimant's right knee and examine him again on August 30, 2000. The evaluation was unchanged from the December 1999 exam. Claimant indicated he was "not having any problems whatsoever with his knee." Instead, Dr. Graham reported Claimant was having problems with his back, "which is not what I was asked to look at." Dr. Graham concluded Claimant was at MMI with no permanent partial disability rating according to the AMA Guidelines, and, therefore, still had no work restrictions regarding his knee. (CX-17, p. 21). Dr. Graham noticed Claimant still had quadriceps atrophy. However, since Claimant reported he was having no problems with his knee, including no buckling, Dr. Graham would have released him to full work duties without restrictions relative to his knee. (CX-17, p. 22).

When asked whether he would contribute the atrophy in Claimant's quadriceps to his past back surgery or knee, Dr. Graham could "not draw a conclusion either way" without an EMG study. (CX-17, p. 25). He was, however, able to conclude that Claimant's fall in April 2001 was not related to his knee surgery or work hardening back injury once he determined that Claimant had rehabilitated his quadriceps with satisfactory muscle strength. (CX-17, p. 27). Since Claimant was not having problems with his knee in August 2000, Dr. Graham opined "it highly unlikely that he has a neurologic deficit" and that his knee was functional from a range of motion and strength standpoint. (CX-17, p. 30).

Dr. Graham was not able to state whether Claimant's pre-existing back injury from 1985 would combine and contribute to the effects of his knee injury to make him materially and substantially more disabled than he would have been had he not had the pre-existing back injury. (CX-17, pp. 28-29).

On cross-examination, Dr. Graham explained an EMG study could tell whether there is active ongoing "deinnervation", whether the person is recovering or "going downhill," and give

clues as to the age of the injury. Dr. Graham testified that if Claimant had begun experiencing quadriceps problems back in the mid-1980s, whether weakness in the quadriceps would have developed immediately or at a later time, would depend on the direct cause. (CX-17, p. 33). Dr. Graham explained that if Claimant had a large herniated disc and weak quadriceps, and then had the disc removed, he would show marked improvement in his muscle strength in the four to six months following his back surgery. (CX-17, pp. 33-34). However, if Claimant is now having post-traumatic bone spurs that are putting pressure on the nerve root, Claimant would slowly begin to experience a loss in strength. However, Dr. Graham testified he did not find any indication of nerve root compression or bone spurs during his evaluations. (CX-17, p. 34).

Dr. Graham explained he had noticed atrophy in Claimant's quadriceps at his last visit, but did not test for any weakness. (CX-17, p. 37). He clarified that any present neurological deficit would not be related to the pre-patellar bursa excision or to the innerspinous ligament tear. (CX-17, p. 38). Dr. Graham opined Claimant's ability to perform heavy work for Employer indicates his quadriceps were strong enough to support his body weight and stabilize his knee, and therefore the atrophy was not important to his daily functioning at that time. (CX-17, p. 40). He also opined there would not necessarily be a correlation between Claimant's limp and his quadriceps atrophy. (CX-17, p. 42).

Dr. Graham testified Dr. Flores has a good reputation in the medical community as an orthopedic specialist. He confirmed Claimant was referred for evaluation of the knee on two occasions by Carrier. (CX-17, p. 42).

On re-direct examination, Dr. Graham confirmed his opinions that Claimant did not have any impairment, disability, or work restrictions, other than the temporary restrictions, based on his evaluation of the knee or back. Nor did Claimant have any assignable impairment rating to the knee or the back as a result of the June 16, 1998 injury. He agreed the probability is that Claimant's leg giving away on April 28, 2001, was unrelated to his employment injury of June 16, 1998. Finally, he confirmed the probability that the atrophy in Claimant's leg is not related to the June 16, 1998 knee injury, but the best way to tell would be to have an EMG study performed. He did not assign any impairment or disability, despite the atrophy. (CX-17, p. 43).

Dr. Joe Jackson, M.D.

On June 15, 2000, Dr. Joe Jackson examined Claimant at the Wellness Restoration Clinic after Claimant was referred by Dr. Flores for his mid-back pain. Although there was some trigger point formation in the lower lumbar region and mild restricted motion, straight leg raising tests were negative and the remainder of the general examination was unremarkable. (CX-3, p. 8). Dr. Jackson's impression was that Claimant had either a torn muscle or ligament in the lower thoracic/upper lumbar region around T-11 as a result of the lifting injury sustained in the work hardening program. Dr. Jackson observed that Claimant's back symptoms appeared "to continue to be present, intermittently worse."

Dr. Jackson suggested a trigger point deactivation program "to see if we can lessen the discomfort and improve his function." After Claimant refused the trigger point deactivation program, Dr. Jackson stated the only other option was to continue a home exercise program to strengthen the muscles of the back and abdomen. He did not think an additional work hardening program was advisable.

Dr. Jackson considered Claimant to be at maximum medical improvement from a neurological perspective, and suggested Claimant "should not return to work at any more than a light to light sedentary level of work." He noted the American Medical Association Guidelines would not allow any percentage of permanent impairment for a muscle ligamentous injury. He also observed the impairment in Claimant's lumbar spine was mostly pre-existing, and therefore he could not attribute any direct percentage of impairment to the current trauma.

Dr. Jackson noted Claimant's "right knee process appears to have responded fairly well to treatment although is minimally symptomatic." However, because Claimant's knee problem was outside his area of expertise, Dr. Jackson requested that Dr. Flores address any residual knee problems. (CX-13, pp. 7-9).

On December 7, 2000, Claimant returned to Dr. Jackson for the trigger point deactivation program for the T-11 area. In addition to back pain, Claimant complained of neck pain that radiated down the left arm with global left arm numbness. Dr. Jackson could not connect the arm pain with Claimant's original work injury because Claimant did not report it on his previous visit with Dr. Jackson. Dr. Jackson suggested Claimant undergo

an MRI of the cervical spine and an EMG/nerve conduction study of the left arm.

Dr. Jackson recommended at least a series of three injections for Claimant's back. He suggested that if Claimant "fails to improve at that time, then he probably is at maximum medical improvement and should return to activities as we previously recommended." If Claimant made significant improvement, then he should continue with a strengthening program. (CX-13, p. 5).

Claimant returned to Dr. Jackson for injections on December 13, 2000 and January 8, 2001. Dr. Jackson suggested three to six additional deactivation procedures with an acupuncture style technique combined with some type of exercise strengthening program such as a work hardening program. Alternatively, Claimant could be sent through a functional capacity evaluation. Dr. Jackson did not believe any surgical options existed. (CX-13, p. 3).

On March 8, 2001, Dr. Jackson reported Claimant had undergone three additional injections. Again, Dr. Jackson recommended that Claimant undergo a work hardening program at a reduced rate while receiving three to six additional injections if the mid-back pain continued to persist. Dr. Jackson stressed the importance of a conditioning program since Claimant would not improve overall without it. (CX-13, p. 2).

Claimant returned to Dr. Jackson on January 2, 2002. Claimant reported he "had an episode where his right knee gave out on him fracturing his hip and injuring his ankle." Claimant inquired about a new type of CT scan that could clarify the etiology of his back pain. Dr. Jackson offered to refer Claimant to an orthopedist at Tulane to clarify this procedure. Dr. Jackson suggested an additional course of trigger point deactivation and a slow, gradual course of an exercise therapy program evolving into a work conditioning program. (CX-13, p. 1).

Hancock Medical Center Records

On April 28, 2001, Claimant presented to the emergency room with right hip "trauma with dislocation" and a fractured left ankle from falling off a ladder. (CX-11, pp. 1-8). Dr. Flores performed a closed manipulative reduction, immobilized Claimant's lower right leg by applying a knee immobilizer, and applied a Buck's traction. Dr. Flores consulted with Dr. Kyle

Dickson of the Tulane University Orthopedic Department regarding Claimant's hip. Claimant was discharged on May 10, 2001, in good condition and given a prescription for Percocet and Naprosyn. (CX-11, p. 1).

Dr. Kyle Dickson, M.D.

Dr. Dickson was deposed by the parties on May 5, 2003. Dr. Dickson is a board-certified orthopedic surgeon. (CX-22, p. 5). Both parties stipulated to Dr. Dickson's qualifications as a specialist in the field of orthopedics. (CX-22, p. 6).

Dr. Dickson recalled performing surgery on May 14, 2001, to repair Claimant's transverse fracture and impaction, explaining "that's just fancy terms for the fact that the cup where the head of the femur sits into was kind of smashed." (CX-22, pp. 6-7). A hospital note by Dr. Dickson dated May 12, 2001, stated Claimant "fell at church on April 28 and sustained a right hip dislocation." (CX-22, p. 7). Dr. Dickson also performed an open reduction, internal fixation of Claimant's fracture on June 25, 2001. (CX-22, p. 8).

On February 20, 2003, the last time Dr. Dickson saw Claimant, he complained of increased left hip and ankle pain. Claimant reported his left ankle continuously felt sprained. He also reported a history of lower back pain which was being followed by Dr. Flores. However, Claimant had not been able to find another doctor after Dr. Flores retired. (CX-22, p. 8). He complained of occasional lower extremity numbness that radiated down the back of his left leg to his toes when he has low back pain. Dr. Dickson noted Claimant seemed to have pretty good strength throughout. His low back pain was tender to palpation over L4-5. Claimant complained of grinding pain in his left hip, occurring with internal and external rotation of the hip as well. He was tender around the peroneal tendons of his ankle and over the subtalar region of the peroneal tendons. (CX-22, p. 9).

Dr. Dickson testified his treatment of Claimant was limited to his hip and ankle. He could not recall if he had assigned MMI to Claimant, but opined it would usually be one year after the surgery. Thus, Claimant's projected MMI would have been June 25, 2002. (CX-22, p. 11). Dr. Dickson also could not recall if he had released Claimant to return to work. He explained when a patient is up and moving around for three to six months, he would be able to perform some type of work on a limited basis with his upper extremities. After he gives

initial limitations in terms of "not putting any weight on it and restrictions in terms of physical therapy," he allows the patient to do as much as he can tolerate after three months post-surgery. (CX-22, p. 12). Dr. Dickson explained the patient may continue to have limitations due to the pain and "other things that still occur." He does not give patients strict limitations. He could not recall if he ever sent Claimant for a work capacity evaluation or functional capacity exam to determine a disability rating. (CX-22, p. 13).

Dr. Dickson clarified the notation in Claimant's chart indicating he was in a motor vehicle accident was a mistake. (CX-22, pp. 13-14). He could not recall any specifics about the fall Claimant had at church, nor did he assign any impairment rating to Claimant as a result of his hip injury. (CX-22, p. 15).

Dr. Dickson could not recall if Claimant had ever complained of his right knee giving-way. However, he did remember reading one article that stated Claimant felt like his ankle was always sprained. When asked whether he thought there would be any permanent partial impairment rating for Claimant's hip, Dr. Dickson opined "I always think that the hip is never the absolute same, . . ." However, he usually refers patients out for disability exams. (CX-22, p. 16).

Dr. Dickson never treated Claimant for his back or right knee problems. In fact, he was not aware Claimant had undergone surgery to his right knee. (CX-22, p. 18). Dr. Dickson agreed the opinions he gave regarding Claimant's ability to work would not have included any problems Claimant may have been having with his back or right knee. (CX-22, p. 19). He also clarified it was Claimant's hip joint that was damaged, not the upper part of the femur. (CX-22, pp. 19-20). Dr. Dickson agreed he had never been involved with Claimant's physical therapy treatment. (CX-22, p. 20).

The Contentions of the Parties

Claimant argues he is temporarily totally disabled as the result of his June 16, 1998 work accident and that his August 30, 1999 back injury and April 28, 2001 hip/ankle/foot injuries are the natural and unavoidable consequences of his job accident. In the alternative, Claimant argues that if maximum medical improvement is found, he is permanently and totally disabled since Employer/Carrier has not shown the existence of any suitable alternative employment.

Employer/Carrier acknowledge Claimant injured his right knee while working for Employer, but deny that his back, hip and ankle/foot injuries are related to his work injury. Employer/Carrier argue that intervening causes resulted in Claimant's back, hip and ankle/foot injuries. Employer/Carrier also contend that Claimant's back injury was a minor temporary aggravation of a prior back problem. They further aver that Claimant was released to return to work after his work injury with no limitations or impairment and therefore no compensation is due after he reached MMI. Alternatively, they assert if Claimant is found to be permanently disabled, they are entitled to Section 8(f) relief.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. The Compensable Injury

Although the parties stipulated to a compensable injury involving Claimant's right knee, the causation of his back, hip and ankle/foot injuries are at issue.

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982).

1. Claimant's Prima Facie Case

(a). The June 16, 1998 Right Knee Injury

Based on the stipulations of the parties, I find and conclude that Claimant's right knee injury of June 16, 1998 is work-related having occurred in the course and scope of his employment with Employer.

Thus, Claimant has established a **prima facie** case that he suffered a compensable injury under the Act.

(b). The August 30, 1999 Back Injury

Claimant also credibly testified that he injured his back while lifting crates during a work hardening program prescribed for treatment of his knee injury. He claims he suffered pain as a result of a pop in his back. Thus, Claimant has established a **prima facie** case of work-relatedness, as more fully discussed below, that his back injury is related to his work injury as a sequela of the latter sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminal, Inc., 21 BRBS 252 (1988).

(c). The April 28, 2001 Hip, Ankle/Foot Injuries

Claimant testified that he suffered an injury to his right hip and left ankle/foot when he fell at the church on April 28, 2001, which he contends are work-related since they stem from his unstable right knee. Assuming **arguendo** Claimant's testimony to be credible, he has established entitlement to the invocation of the Section 20(a) presumption.

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n. v. Bunol, 211 F.3d 294, 34 BRBS 29 (CRT)(5th Cir. 1999). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984). It has been repeatedly stated that employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

After his August 30, 1999 back injury, Claimant was initially treated by Dr. Flores who referred him to Dr. Jackson. Dr. Jackson detected mild restrictive motion in Claimant's mid-back and diagnosed a torn muscle or ligament. On June 15, 2000, Dr. Jackson opined that Claimant was at maximum medical improvement and could perform light to light-sedentary work. Dr. Flores agreed with Dr. Jackson's opinion. Dr. Jackson concluded that no impairment percentage could be assigned to a muscle-ligamentous injury. He further opined that any impairment Claimant had was mostly pre-existing and he could not attribute any impairment to his August 30, 1999 trauma.

Employer/Carrier offered the observations of therapist Shepherd who reported contradictions between Claimant's back claim and his behavior which exhibited no pain posturing, facial grimacing or limping and inconsistent straight leg raising tests. She determined that Claimant tested positive for symptom magnification when Waddell's tests were administered.

Dr. Graham, to whom Carrier referred Claimant for a second opinion, also concluded that Claimant's back injury was consistent with a ligament tear or soft tissue injury and comported with Claimant's description of trauma while participating in work hardening. Claimant had a normal neurological examination. He opined Claimant had no permanent impairment or restrictions as a result of his recent back trauma and only temporary work restrictions were assignable for four months while the ligament healed.

Since Claimant was undergoing work hardening in connection with his work-related knee injury, his back injury, sustained during the course of the work hardening program, is covered under the Act because it necessarily arises out of and in the course of his employment. Clearly, Claimant would not have been undergoing work hardening if he had not injured his knee during the course of his employment, therefore, his back injury also arose out of the course of his employment. See Mattera v. M/V Antoinette, Pacific King, Inc., 20 BRBS 43 (1987); Weber v. Seattle Crescent Container Corp., 18 BRBS 146 (1986); see also Guilliam v. Tubular Technology, Inc., BRB No. 02-0829 (Ben Rev. Bd. September 4, 2003) (unpub.) (claimant was properly entitled to the Section 20(a) presumption in his claim for a back injury when he injured his back exiting a helicopter on the way to a hospital to treat for a stroke sustained on the job). Because of the work-relatedness of Claimant's back injury, I find the intervening cause doctrine inapplicable.

Employer/Carrier has presented no contrary medical evidence or opinion severing the causal connection between Claimant's job injury and his resulting back trauma and thus has failed to rebut Claimant's **prima facie** case of a compensable back injury.

Both parties offered extensive testimony about the mechanism of Claimant's hip and ankle/foot injuries. Claimant's testimony stands alone. None of the other witnesses observed Claimant's fall. Moses Hill assumed that Claimant fell from the painter's ladder since he was lying underneath the ladder. He reported such a fall when he summoned medical assistance. Thereafter the record reveals a consistent history of Claimant falling from a ladder. Aside from an argument about assumption of the risk if Claimant fell from a ladder and credibility of witnesses, I find the pivotal issue centers around whether Claimant's knee gave-way or buckled thus causing him to fall. It matters not whether he fell while exiting the church steps or from a ladder, but that his fall is related to a give-way or buckling of his knee. It is Claimant's burden to demonstrate that his hip and ankle/foot injuries were caused by or related to his work-related knee injury or its residuals.

In the present case, Employer presented Claimant's medical records from Dr. Victor Bazzone, Hancock Medical Center, Rehabilitation Center, Work Force Rehab, Coastal Rehabilitation of Bay St. Louis, and American Medical Response, Inc., and the testimony of Drs. Thomas Flores, Ronald Graham, Kyle Dickson, and Joe Jackson. On April 28, 2001, Claimant presented to Hancock Medical Center's emergency room with right hip trauma

with dislocation and a fractured left ankle. Claimant claims his injuries stemmed from his right knee giving-way, causing him to fall down the steps at his church. However, the testimony of examining and treating doctors and witnesses and medical reports detract from Claimant's credibility and **prima facie** case.

Employer produced substantial evidence sufficient to rebut the 20(a) presumption based on: (1) Claimant's last report of having any knee problems occurred on January 6, 2000 prior to his fall at the church on April 28, 2001; (2) there is no report of Claimant's fall at the church being caused by his knee giving-way in the EMT, hospital, or Dr. Flores's reports; (3) the first record of Claimant's knee giving-way and causing his fall is contained in a confirmatory letter from Michelle Edwards to Mary Weidner dated July 9, 2001, over two months after the accident; (4) Claimant reported to Dr. Graham on August 30, 2000 that he was "not having any problems whatsoever with his knee;" (5) despite the complaint that his right knee still buckles at the time of the hearing, Claimant has not sought medical care for his knee since he completed work conditioning at Coastal Rehabilitation on February 16, 2000; and most importantly, (6) Dr. Graham was able to conclude that Claimant's fall on April 28, 2001 was not related to his knee surgery or work hardening back injury once he determined Claimant had rehabilitated his quadriceps. Accordingly, Employer has presented substantial evidence which rebuts the Section 20(a) presumption that there is no relationship between Claimant's work injury to his knee and his fall almost three years later.

3. Weighing All The Evidence

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

The record establishes that Claimant had subsequent problems associated with his work-related knee injury, however, I find and conclude that Claimant's medical evidence and testimony do not establish his April 28, 2001 fall was related to his prior work-related knee injury.

Claimant must demonstrate by a preponderance of the evidence that his work-related knee injury caused or contributed to his hip and ankle/foot injuries to prevail. In light of the testimonial and medical evidence, I find Claimant has not met

his burden under Greenwich Collieries. The medical opinions of record submitted by Claimant and Employer are in dispute. I find the absence of medical documentation relating to Claimant's knee "giving-way" or "buckling" is detrimental to his claim.

Beginning with Chris Powell's AMR report, there is no mention of Claimant's knee buckling or giving way and causing the accident. The report states "a patient fell twenty feet from a ladder onto concrete dirt surface." Mr. Powell testified Claimant was conscious and alert, awake, and oriented on the scene of the accident, and that he would have made a notation if Claimant told him he did not fall off the ladder. I find Claimant's testimony to the contrary incredible. Nor do the emergency room medical records at Hancock Medical Center or Dr. Flores's records mention Claimant's knee giving-way as a cause of the accident. Both relate the cause of Claimant's accident to falling off a ladder.

Claimant stated that, prior to his April 28, 2001 accident, he told Dr. Graham, Dr. Flores, Dr. Dickson, Ms. Shepherd and Mr. Pullman about his right knee giving-way, and it was an oversight that they had not included this complaint in their reports.

Dr. Flores, Claimant's treating physician, had no report of Claimant's knee giving-way or buckling, even while Claimant was seeing him on a regular basis for knee problems from September 1998 to March 27, 2001. Dr. Flores testified he could only speculate that the pain Claimant experienced on "lateral movements" could be a sign of buckling. He also agreed he had speculated in his response letter to Claimant's attorney that the fall on April 28, 2001 was caused by Claimant's knee giving-way. He admitted that even if Claimant's knee had given-way, it could have been related to his prior back injury in the 1980s or from the more recent torn ligament in his back. Additionally, Claimant ceased making any complaints about his knee to Dr. Flores after his work hardening back injury on August 30, 1999. The last time Claimant reported any knee problems to Dr. Flores was during his visit on May 4, 1999. He continued to see Dr. Flores for back pain until his last office visit on March 27, 2001. Claimant had made no complaints to Dr. Flores about his knee, with whom he had principally treated, for over twenty-two months.

After Claimant completed physical therapy for his knee at Coastal Rehabilitation of Bay St. Louis, physical therapist Jay Pullman noted in a letter dated January 6, 2000 that Claimant

had minimal complaints of knee problems, and that his primary concern was no longer his knee, but his back. Mr. Pullman also reported Claimant had satisfactory rehabilitation of his quadriceps by the end of his physical therapy on May 5, 2000. Mr. Pullman had no record in his notes of Claimant's knee giving-way. On April 20, 2003, he recalled Claimant relating his hip injury to his right leg giving-way.

Dr. Graham saw Claimant after his knee operation on December 22, 1999. He found Claimant's knee to be stable, but also found quadriceps atrophy. Claimant informed Dr. Graham that if he didn't wear his knee brace, his knee "buckled out from underneath him." Dr. Graham testified this would be true if Claimant had weak quadriceps. He also opined that weak quadriceps could be related to Claimant's knee injury and subsequent surgery, or his back surgery in the mid-1980s. He could not draw a conclusion either way. However, once it was determined that Claimant had rehabilitated his quadriceps at Coastal Rehabilitation, Dr. Graham concluded the knee injury was not related to his hip and ankle/foot injuries. During a re-evaluation on August 30, 2000, Claimant reported he was "not having any problems whatsoever" with his knee. Even though Dr. Graham noticed quadriceps atrophy, he opined he would not have assigned any impairment, disability, or work restrictions with regard to Claimant's right knee because Claimant reported he was not having any problems with it. Dr. Graham would have released Claimant to full duties.

Claimant was referred to Dr. Jackson for his back. In a letter dated January 2, 2002, he stated Claimant reported that he "had an episode where his right knee gave out on him." However, this statement was made after the accident on April 28, 2001. Knee problems were not in Dr. Jackson's area of expertise, and he did not treat Claimant's knee.

Dr. Dickson did not recall whether Claimant had ever complained of his knee giving-way. He was not even aware Claimant had undergone surgery to his right knee.

In addition to the absence of medical documentation, no witness could substantiate Claimant's assertion that he had problems with his knee giving-way or buckling. Claimant's brother, Moses Hill, was the first to arrive on the scene of the accident on April 28, 2001. He testified he never discussed with Claimant any problems that Claimant was having with his right knee prior to the accident, but he was aware Claimant was having problems with his knee. Rev. Harvey Graham also

testified he remembered Claimant telling him he was having trouble with his knee and seeing him walk with a cane. However, neither witness had any recollection of Claimant complaining about his right knee giving-way or buckling.

4. Conclusion

I find Claimant's testimony about the mechanism of his hip and ankle/foot injuries unconvincing since it is clearly not corroborated by the medical evidence of record. Consequently, I find Claimant's testimony lacks credibility in this regard. Furthermore, in light of the foregoing, I find Claimant, as the proponent of his claim and position failed to carry his burden of production and persuasion in establishing the existence of compensable hip and ankle/foot injuries. Therefore, his hip and ankle/foot claim is hereby **DENIED**.

B. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable knee injury, and having found that he also suffers from a compensable back injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co.

v. Shea, 404 F.2d 1059 (5th Cir. 1968) (per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v.

Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Prefatorily, it is noted and well-settled that the opinions of a treating physician, when well-reasoned, are entitled to greater weight than the opinions of non-treating physicians in administrative proceedings. See e.g., Loza v. Apfel, 219 F.3d 378, 395 (5th Cir. 2000).

Dr. Flores initially concluded that Claimant had reached MMI for his knee injury on February 25, 1999, three weeks after the bursa was excised and the staples removed. Thereafter, Claimant continued to complain of knee pain. On August 9, 1999, after a FCE, Dr. Flores opined that Claimant had not yet reached MMI for his right knee injury. He concluded that no permanent rating was assignable to Claimant's right knee because of the bursa excision. Dr. Flores rendered no further opinions about Claimant reaching MMI for his knee injury. On June 17, 2003, inconsistent with his earlier opinion, Dr. Flores opined that a four percent impairment rating should be assigned to Claimant's right knee. Dr. Flores also assigned permanent restrictions for Claimant's right knee of no heavy lifting, no crawling and no ladder climbing. (EX-9, exh. 3).

Dr. Graham opined that Claimant's knee was stable when he first examined Claimant on December 12, 1999, with no permanent impairment or restrictions. He further opined that Claimant would have temporary restrictions of no kneeling or crawling for an approximate period of ten months until the surgical scar healed. He noted that Claimant had a "well-healed transverse incision" at the time of his examination. Thus, I find Claimant would have reached MMI according to Dr. Graham by December 12, 1999. Therefore, in the absence of a later opinion from Dr. Flores, I find and conclude that Claimant reached maximum medical improvement for his right knee injury on December 12, 1999.

Both Dr. Graham and Jackson opined, contrary to Dr. Flores's June 2003 response, that Claimant had no permanent impairment rating for his right knee because no rating was available under the AMA Guidelines for a bursa excision. Based on the reasoned opinions of Drs. Graham and Jackson, to which Dr. Flores had initially expressed agreement, I find Claimant has no permanent impairment rating assignable under the AMA

Guidelines. However, consistent with the findings of the FCE and baseline evaluation that Claimant could not perform his former job, I find Dr. Flores's opinion that Claimant suffered permanent restrictions as a result of his work-related knee injury to be reasoned and that Claimant could not return to his former heavy job. Thus, Claimant was totally disabled upon reaching MMI on December 12, 1999 from his right knee injury.

Dr. Jackson, who was Claimant's treating physician for his back injury, opined Claimant had reached MMI for his back injury on June 15, 2000, but that Claimant should not return to any work more than light or light sedentary in exertional demand. Dr. Jackson did not assign any impairment rating to Claimant's back because it involved a muscle or ligament injury which was not encompassed under the AMA Guidelines. He further concluded that Claimant's impairment was related instead to his pre-existing back injuries and surgery and was not attributable to his work hardening back injury. Dr. Jackson did not specifically clarify whether any physical restrictions were attributable to Claimant's August 1999 back injury. Dr. Flores deferred to Dr. Jackson's opinion.

On June 17, 2003, inconsistent with his prior opinions, Dr. Flores assigned a ten percent whole body impairment to Claimant and opined that Claimant had permanent restrictions of no heavy lifting, no crawling, no ladder climbing, no bending, squatting or pushing as a result of his August 1999 back injury. I discount Dr. Flores's opinions regarding Claimant's back as unreasoned and internally inconsistent since he was not the primary treating physician for the back injury. His inconsistent opinions were never explicated or supported by the medical evidence or record.

Dr. Graham's opinion of Claimant's back injury comports with the opinion of Dr. Jackson. He assigned no permanent impairment rating or restrictions for Claimant's back injury of August 1999. He noted Claimant would have had temporary restrictions for four months of lifting no more than 20 pounds, limited carrying overhead and limited climbing scaffolds, ropes or poles. Arguably, Claimant would have reached MMI for his back injury as early as December 30, 1999.

I find and conclude, consistent with the opinions of Drs. Jackson and Graham, that Claimant suffered only a temporary disability to his back as a result of his work hardening injury. I further find that Claimant had reached MMI for his back injury by June 15, 2000, and that the injections offered by Dr. Jackson

were to alleviate Claimant's pain which the record does not support as related to his most recent trauma. Moreover, to the extent Claimant suffered any impairment when he reached MMI, he had no continuing disability or work restrictions related to his work hardening temporary injury. Accordingly, Claimant is not entitled to any continuing compensation after June 15, 2000, for his temporary back injury.

Since Claimant is entitled to temporary total disability compensation benefits for his work-related knee injury from June 17, 1998 to December 11, 1999, excluding any periods of employment or wages earned, based on his average weekly wage of \$677.13, any benefits for his temporary back injury would be subsumed by his concurrent entitlement for his knee injury. On December 12, 1999, when Claimant reached MMI for his knee injury, he became entitled to continuing total disability benefits based on his average weekly wage of \$677.13, therefore any benefits attributable to his temporary back injury through June 15, 2000, would also be subsumed by his concurrent entitlement to total disability for his knee injury.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, as here, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find

specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

In the present case, Employer has not shown the existence of any suitable alternative employment available for Claimant whether internally within its operations or in the relevant labor market. Therefore, Claimant's total disability for his knee injury became permanent on December 12, 1999.

E. Entitlement to Medical Care and Benefits

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For

medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The parties having stipulated to Claimant's knee injury and having found that he also suffered a temporary injury to his back which is work-related, Claimant is entitled to past, present and future reasonable and necessary medical benefits for his right knee injury and temporary back injury attributable to his work-hardening accident, if any. Claimant submitted medical bills comprised as CX-19 which appear to relate for the most part to his hip and ankle/foot injuries, which are not compensable or reimbursable. To the extent any of the medical bills relate to his knee and temporary back condition, Employer/Carrier are responsible for such medical bills.

F. Entitlement to Section 8(f) Relief

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) that the current disability is not due solely to the employment injury. 33 U.S.C. § 908(f); Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C & P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, 782 F.2d 513, 516-517 (5th Cir. 1986) (en banc).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. V. Director, OWCP, U.S. DOL, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not

confined to conditions which cause purely economic loss. C & P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

In the present matter, Employer/Carrier contend that they are entitled to Section 8(f) relief since Claimant's right knee injury of June 16, 1998 caused his hip injury of April 28, 2001. (EX-19, p. 3). In brief, Employer/Carrier argue that since Claimant had a pre-existing back condition as a result of surgeries in the 1985 and 1986, if Claimant is found to have suffered a back injury with impairment in 1999, the pre-existing condition and Claimant's August 1999 back injury combined and contributed to make him "substantially more disabled than he would be but for the alleged current injury alone."

Counsel for the Regional Solicitor argues there is no evidence that a pre-existing permanent partial disability existed and, therefore, Employer/Carrier have failed in their burden under Section 8(f).

The record in the present matter reveals that the only injuries suffered by Claimant before June 16, 1998, were to his back. Dr. Bazzone performed a lumbar laminectomy and discectomy at L4-5 on October 7, 1985 and a lysis of the adhesions at L4-5 on October 27, 1986. On February 10, 1987, Claimant had reached MMI and was released to gainful employment. The record does not support any assigned permanent impairment rating or permanent restrictions as a result of Claimant's back injuries and surgeries. There is no dispute that Claimant thereafter worked in heavy jobs in the shipyards until he injured his right knee on June 16, 1998.

Thus, the record is devoid of any evidence to determine whether Claimant's pre-existing back injury resulted in a permanent disability. Moreover, I find that the record is devoid of evidence to show that a cautious employer would discharge Claimant because of a greatly increased risk of a work-related injury. Claimant did not testify that he experienced problems with his back while performing any work activity prior to June 16, 1998, nor did he seek medical treatment for his back before August 1999. Thus, based on the lack of evidence, I find and conclude that Claimant did not suffer from a pre-existing permanent back injury.

Assuming **arguendo** that Claimant had a pre-existing permanent partial disability as a result of his back injuries and surgeries in 1985 and 1986, there is no evidence that his condition combined or contributed to a worsening of his back condition as result of his August 30, 1999 temporary back injury. Dr. Jackson attributed Claimant's existing impairment to his prior back injuries and could not attribute any percentage of impairment to Claimant's temporary back injury of August 1999.

Contrary to any argument that Claimant's pre-existing back condition and his knee injury of June 16, 1998 combined or contributed to make him materially and substantially more disabled, Dr. Graham specifically opined that he could not state such a combination or contribution occurred. Thus, Employer/Carrier have not established combination or contribution involving Claimant's prior back condition and his right knee injury.

Lastly, having found that Claimant's knee injury and its residuals, if any, did not cause his hip and ankle/foot injuries, Employer/Carrier have also failed to establish any combination or contribution element between such injuries.

I find and conclude that Employer/Carrier have not established Claimant suffered a permanent partial pre-existing disability at the time of his work-related injury on June 16, 1998, nor that any of his injuries, whether pre-existing or current, combined and contributed to a greater degree of permanent partial or permanent total disability.

Section 8(f) will not apply to relieve Employer of liability unless it can be shown that an employee's permanent total disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, supra. An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent partial or total disability. Id. **If a claimant's permanent total disability is a result of his work injury alone, Section 8(f) does not apply.** C & P Telephone Co., supra; Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980).

Accordingly, I find and conclude that Employer/Carrier have failed to establish the pre-requisites necessary for entitlement to Section 8(f) relief under the Act and, therefore, their

request for Section 8(f) relief is hereby **DENIED**.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, the parties have stipulated that Employer/Carrier filed a timely Notice of Controversion, therefore no penalties are warranted.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills" Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days

from the date of service of this decision by the District Director to submit an application for attorney's fees.⁷ A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from June 17, 1998 to December 11, 1999, based on Claimant's average weekly wage of \$677.13, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from December 12, 1999 to present and continuing thereafter based on Claimant's average weekly wage of \$677.13, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2000, for the applicable period of permanent total disability.

⁷ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **August 23, 2002**, the date this matter was referred from the District Director.

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's June 16, 1998 work injury to his right knee and his August 17, 1999 work injury to his back, but excluding any medical benefits attributable to his April 28, 2001 hip and ankle/foot injuries, pursuant to the provisions of Section 7 of the Act.

5. Employer shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Employer/Carrier's Application for Section 8(f) is **DENIED**.

8. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 14th day of January, 2004, at Metairie, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge